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after a trial by jury of the crimes of Robbery in the Third Degree, Grand Larceny in the First Degree and Assault in the Second Degree; and sentenced to a term of 7 years imprisonment on the Robbery and Assault charges and 4 years on the Grand Larceny charge, all to run concurrently.

The Appellate Division of the Supreme Court of the State of New York, Second Department, unanimously affirmed without an opinion on January 5, 1970, but a memorandum was written by Mr. Justice Hopkins. That memorandum is reported in 33 A.D. 2d 936.

Jurisdiction

Petitioner claims the jurisdiction of this Court should be invoked in that his rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution were violated. He claims that his right to a fair trial and due process of law were violated in that the Judge's charge to the jury was coercive; and further that statements were used against him at the trial in violation of his Constitutional rights.

Respondent takes the position that no substantial Federal question exists.

The Facts

Mr. Leo Huberman was returning from work on September 22, 1967 at about 5 P.M. and went to his apartment on the second floor of 1730 Carroll Street, Brooklyn, New York (7-10).* When he arrived at his apartment Mr. Huberman was grabbed under the chin from behind. As Mr. Huber-

* Number in parentheses refer to pages of the trial record.

man slid down to the ground his pants pockets were emptied and during this assault he cried for help (10-11). The assailant released his victim and started running downstairs with Mr. Huberman following, yelling for him (11). The defendant ran down the rear stairway and Mr. Huberman went down the front stairway and did not lose sight of the defendant (28-30). On the ground floor of the building Mr. Huberman saw the defendant wrestling with the building superintendent who was holding him (11-12, 30, 31). At that time a tenant of the building came into the lobby with a pistol and the defendant was restrained until the police arrived (12).

Mr. Huberman's throat was injured requiring treatment and he was robbed of $116 and his set of keys (13, 14). A police officer arrived and searched the defendant Williams in the presence of Mr. Huberman. The complainant saw the officer take from the defendant's pocket his (Mr. Huberman's) keys (15, 17, 35). The $116 was never recovered although a search was made for it in the house (25, 36).

Mr. William Cogdell, a Correction Officer, was living in 1730 Carroll Street at the time of the within occurrence (44). Sometime around 5 P.M. he heard cries for help, picked up his weapon and ran out into the hall (45-46). In the vestibule of the hallway he saw the defendant fighting with the superintendent of the building (46, 47, 52, 55). He broke up the altercation and held the defendant at gunpoint (47-48). He saw the police officer remove a key case from the defendant's right hand pocket (51). He did not see a young Negro girl in the vestibule (54).

Patrolman Joseph A. Compitiello responded to a radio call and arrived at 1730 Carroll Street approximately 5

P.M. on September 29, 1967 (56). Upon his arrival the officer noted the defendant being held at bay by a number of civilians (56). The officer placed the defendant under arrest after having a conversation with the people in the area, searched him and found in defendant's right front trouser pocket a case containing approximately six keys (57). After marking the case he returned it to Mr. Huberman, the complainant (56, 63, 69). The officer did not recall having a conversation with a young Negro girl in the neighborhood (61).

The Superintendent of 1730 Carroll Street at the time of this occurrence, Mr. Jose Padilla, lived on the first floor of the building (7). At about 5 o'clock on September 29, 1967 he was in his apartment when he heard someone screaming for help and came out of his door (75). He saw an individual running down the back stairs, told him to stop and when the man continued to run, grabbed him (75, 77). He saw no one else in the hallway at that time (83). The complainant was running after the defendant yelling, "That's the man" (75, 76). While he was wrestling with the defendant Mr. Cogdell arrived with a gun and held the defendant against the wall (78-79).

Yvonne Williams testified for the appellant that she met Andrew Williams on the street near 1730 Carroll Street at about 5 or 5:30 on September 29, 1967 (88, 89, 95). She was on her way to see her friend Delta Williams and invited the defendant to come along (89, 95). They took the elevator to the third floor and heard crying on the second floor (89, 90, 91). The defendant went downstairs in the direction of the sound to see what was happening (91). She then got into the elevator and went down to the first floor

where she saw the defendant being held by the superintendent of the building. She said nothing and left the building (92, 96, 97).

The defendant Andrew Williams testified that at the time in question he entered 1730 Carroll Street with his friend Yvonne and went to the third floor (102, 103). He heard a cry and went down to the second floor where he saw a man lying on the ground who seemed to be having some sort of fit (103). Mr. Williams then started running downstairs to obtain help when he was grabbed and held by the arm. Shortly thereafter an officer from the Department of Correction came down with a pistol, hit him in the mouth and forced him against the wall (103). Some time later a uniformed police officer arrived at the scene, searched him and took his wallet and keys (104). Thereafter the officer returned with a black object in his hand and gave it to the complainant (104). The defendant testified that he never grabbed Mr. Huberman from behind or took anything from him (106). Mr. Williams testified that he knew Steven Kelly who used to rob people when he lived in Brownsville (111-112). He knew Steven Kelly's reputation as a mugger (118). After summation by counsel for both sides (122-149) the Court charged the jury (302-359). The jury retired for deliberation and some time thereafter requested the testimony of the police officer and the superintendent of the building to be reread to them (364). Later the jury requested further instructions from the Court (365-367). Then the jury advised the Court concerning their inability to reach a unanimous decision (368) and further addressed a communication to the Court (371). The Court commented upon that communication and asked the jury whether they desired to be discharged or to continue their deliberation

(373). The foreman advised the Court that they would try again (373). The jury returned with a Guilty verdict (376).

POINT I

The judge's charge to the jury was not coercive in the instant case and this Court need not review the "Allen Charge" doctrine.

The petitioner's application contains a number of questions which it requests this Court to review. A reading of that application indicates that the only issue which should validly be considered is the question of the Court's charge to the jury.

A great deal of comment and controversy surrounds the charge given in many jurisdictions by the Trial Court to a jury that has been in deliberation for some time, but has failed to reach a unanimous verdict. The so-called "Allen Charge" had its origins in this Court's opinion in *Allen v. United States*, 164 U.S. 492 (1896). Since that time, the direction to the jury on its obligations has taken many forms. There is little question that the jury should be informed of the importance of their reaching a verdict and the problem that will arise if they fail to do so. The jury may be made aware of the fact that if they fail to agree, another jury will be called upon to hear and determine the issues in the case; and therefore, they may be urged to come to a verdict if possible (93 ALR 2d 672).

The determination of how long a jury may be called upon to deliberate when it does not agree, has been considered a matter of discretion with the Trial Court. It seems clear that what is objected to concerning the "Allen Charge" is not the charge itself, but rather the question of whether or not

it exerts undue coercive pressure upon the jury, thereby depriving the defendant of a fair trial.

This problem has been commented upon by almost all of our Courts and has been dealt with differently in various jurisdictions. It has been completely abolished in some areas, restricted in others, and upheld in numerous jurisdictions. (See *State* v. *Thomas*, 86 Ariz. 161 (1959); *Commonwealth* v. *Spencer*, 216 Pa. Super. 169 (1970); *People* v. *Randall*, 9 N.Y. 2d 413 (1961—New York Court of Appeals); *United States* v. *Fiorvaranti*, 412 F.2d 467 (1969-Third Cir.); *United States* v. *Sayers*, 423 F.2d 1335 (1970-Fourth Cir.); and *Thaggard* v. *United States*, 354 F.2d 735 (1965-Fifth Cir.).)

The instant case involves a set of facts wherein the charge given by the Trial Court was neither coercive nor prejudicial to the rights of the defendant. In the instant matter, the Court, after explaining to the jury its obligations, noted:

> "The Court: Gentlemen, I am going to send you to a hotel, unless you don't want me to. I was about to ask if there was anything which was confusing you; anything as to the law; anything as to your obligation as jurors, as citizens. * * *
>
> Gentlemen, please understand that no Judge has the right to force a jury to agree on a verdict. You were advised of only one thing; that it was for you to consider the evidence; and you must discuss it; you must talk to one another; you must listen to the other fellow's arguments while presenting yours." (368-69).

Thereafter the Court explained to the jury that it desired them to continue their deliberations and emphasized its remarks by saying, "If a verdict is possible, there should be one. If a verdict is impossible, then of course the Court will

discharge the jury from further deliberations in the case." (370-71) The jury then requested some further information from the Court and after it was advised the following took place:

> "Gentlemen, do you want to be discharged now as jurors? Or do you want to return to your jury room for further deliberation?
>
> The Foreman: I think we ought to try it one more time, your Honor." (373)

It is apparent that it was the decision of the foreman of the jury, after hearing the Court's instructions, to return and deliberate further. As can be noted from the above, in the final analysis the judge left up to the jury through its foreman, the question of whether it should continue deliberations or be discharged. It was the jurors choice to deliberate further.

It is well settled that the determination of how long a jury may be kept together when it does not agree is a matter of discretion for the trial Court and said discretion will not be disturbed unless there is a severe abuse thereof. *People* v. *Presley*, 22 A.D. 2d 151; *People* v. *Camponaro*, 233 App. Div. 248 *aff'd* 249 N.Y. 545; *People* v. *Becker*, 215 N.Y. 126; *People* v. *Koerner*, 117 App. Div. 40 *aff'd* 191 N.Y. 528.

This Court has already indicated that it will not condone coercive remarks to juries by the presiding Judge. (see *Jenkins* v. *United States*, 380 U.S. 445.) In view of this position, there appear to be sufficient guidelines concerning the Constitutional questions of how far a Trial Court may proceed in requesting a jury to come to a determination. The instant case does not represent a set of circumstances where the Trial Court abused its privilege or misdirected the jury.

POINT II

None of the Petitioner's Constitutional rights were violated and the conduct of the cross-examiner at the trial was proper.

Petitioner raises two questions concerning his testimony and the Assistant District Attorney's questioning of him during cross-examination.

The first point concerns his relationship to Steven Kelly, an individual with a questionable reputation. This contention is not of Constitutional dimension. Further, the information concerning Kelly, came about during cross-examination when the petitioner was asked if he knew Kelly. The affirmative answer cannot be construed to militate against the defendant. Appellant's brief urges that the defendant admitted a friendship of three or four years with Mr. Kelly and that this admission in some way was harmful to the defendant. The defendant replied that he did not see Steven Kelly often. Further and more importantly the defendant mentioned Steven Kelly to the District Attorney as a possible perpetrator of the instant crime. It would seem therefore that evidence of the existence of Steven Kelly would tend to exonerate this defendant rather than implicate him in the crime. The title given to Steven Kelly as "the mugger of Brownsville" was volunteered by the defendant and was not suggested by the District Attorney. The question eliciting that response was "What do you know him (Steven Kelly) as?" The defendant could easily have said Steven Kelly the butcher, or Steven Kelly the banker, or Steven Kelly the gambler. The defendant chose to dub Steven Kelly as the "mugger of Brownsville" and

this nomenclature should not be held as error committed by the People.

Additionally, petitioner raises a question concerning an alleged violation of his rights under the doctrine as set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966); and *Messiah* v. *United States*, 377 U.S. 201 (1964).

Petitioner's reliance on these two doctrines is misplaced. The sole question in the instant case revolves on whether or not, during cross-examination, a defendant may be interrogated concerning statements made by him without the proper safeguards as dictated by *Miranda, supra.*

The propriety of such cross-examination has been previously adjudicated valid in the State of New York.

It is well settled that a statement given by a defendant may be used on cross-examination where the defendant has taken the witness stand in his own defense. *People* v. *Harris*, 25 N.Y. 2d 175; *People* v. *Kulis*, 18 N.Y. 2d 318. In the *Harris* case, *supra*, the Court of Appeals reaffirmed the proposition that a statement obtained from the defendant after his arrest and under conditions which may have violated the requirements of *Miranda* v. *Arizona*, 384 U.S. 346, although not available on direct examination may be used on cross-examination of the defendant where he takes the stand.

The defendant's contention concerning the necessity of notice pursuant to Section 813f of the Code of Criminal Procedure is not well taken. In the *Harris* case, *supra*, the Court of Appeals ruled directly on this question when it stated, "accordingly, when the prosecution never offers nor plans to offer a statement in evidence against the defend-

ant, the section in question is just not applicable. Moreover, where, as in the present case, a statement obtained in violation of *Miranda* is used solely for impeachment purposes, no purpose would be served by requiring compliance with Section 813f, and the People were not obligated to furnish the notice there prescribed."

It should be noted that the New York rule concerning the use of statements taken in violation of a defendant's *Miranda* rights on cross examination is presently before this Court in the case of *Harris* v. *New York*, Cert. granted 398 U.S. 937 (1970); and is scheduled for argument during the October, 1970 Term.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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December, 1970